UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BALLARD CANAL CO., INC. d/b/a BALLARD MILL MARINA, Plaintiff, v. THE NORTHLAND, OFFICIAL NO. 606189, *in rem*, and NORTHLAND FISHERIES, INC., *in personam*, Defendants.	IN ADMIRALTY CASE NO. C02-473W ORDER GRANTING SUMMARY JUDGMENT FOR PLAINTIFF

I

This is an admiralty action brought by plaintiff Ballard Canal Company, Inc., for collection of unpaid moorage fees against the fishing vessel the NORTHLAND and its corporate owner, Northland Fisheries, Inc. (NFI).[1] The vessel has been arrested. This matter comes before the court on plaintiff's motion for summary judgment. Defendants admit liability, but contest the amount of fees owed.

[1] Taku Marine, AK, has also filed a claim against the NORTHLAND. (*See* Doc. 11.) It recently submitted a Complaint in intervention, but did not accompany that with a motion and proposed order, as required by W.D. Wash. Local Admiralty Rule 131(a). This order does not address any claim held by Taku Marine.

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Pursuant to the consent of the parties, the United States Magistrate Judge exercises jurisdiction under 28 U.S.C. § 636(c). In addition, although this case sounds in admiralty, in accordance with lease provisions, Washington State law governs all substantive issues unless otherwise noted. Having reviewed the parties' summary judgement papers and the remaining record, plaintiff's motion will be granted for the reasons given herein.

II

On July 18, 1997, NFI entered into a commercial lease with plaintiff to moor the NORTHLAND at the Ballard Mill Marina, owned and operated by plaintiff. (*See* Doc. 17 at Ex. A.) The lease was for an initial term of one month, and provided that it would continue on a month-to-month basis until termination by either party. (*See id.*) In addition, the lease specified a monthly rent of $1640.00. Written notations in the margins of the lease indicate that the monthly rate was based on a vessel-length of 205 feet. (*See id.*)

Sometime after this lease was entered into, NFI began to fall behind on the monthly moorage payments. (*See* Doc. 16.) This delinquency eventually led to the signing of a "Memorandum of Agreement" on December 14, 1998, in which NFI agreed to a specific payment schedule for money owed to plaintiff, and reiterated the $1640 per month lease amount. (*See* Doc. 17 at Ex. B.) This agreement was signed by a lower-level employee of NFI, characterized by defendant as a "temporary bookkeeper." (*See* Doc. 25 at 3.)

NFI made several more payments after that agreement, but again became delinquent. (*See* Doc. 17 at 3.) As a result, plaintiff placed a lien on the NORTHLAND, and brought this action. (*See* Doc. 1.)

III

In its summary judgment motion, plaintiff asserts that it is owed $53,755.65 in moorage fees and interest through March 27, 2002, with prejudgment interest accruing at the rate of $16.87 per day. (*See* Doc. 16.) Defendants argue that the amount of fees is overstated. They

contend, in the main, that the monthly lease amount was inflated due to a mistaken assumption regarding the length of the NORTHLAND. Plaintiff contests that point, and notes that defendants admitted the amount of damages by filing to respond timely to requests for admissions. (*See* Doc. 22.) Defendants have moved to withdraw those admissions. The issue of whether defendants are bound by their silent admissions will be first addressed.

REQUEST FOR ADMISSIONS

Under Federal Rule of Civil Procedure 36, parties must respond within 30 days to written request for admissions. If no objection or answer is made, the matter relating to the request is deemed admitted. For requests that are served by mail, an additional three days is added to the prescribed period pursuant to Rule 6(e).

Plaintiff contends that it mailed its First Requests for Admissions on May 10, 2002. Defendants present no evidence contradicting this. (*See* Doc. 22) By the court's calculation, defendants had until June 12, 2002, to respond, which they failed to do. (*See* Doc. 27). Instead, defendants served their responses on June 14, 2002. As a result, plaintiff is correct that their requests were deemed admitted by operation of Rule 36.

Defendants request that the court permit withdrawal or amendment of the admissions. (*See* Doc. 27 at 2-3.) Under Rule 36(b), the court has the power to permit withdrawal or amendment of admissions when "the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits."

Defendants have shown good cause for withdrawal, and plaintiff has not shown that it will be prejudiced by such action. Failure to grant withdrawal would also subserve "the presentation of the merits of the action." Accordingly, to enable the court to address the merits of defendants' defenses to the motion for summary judgment, the request to withdraw or amend the admissions will be granted, and defendants' belated responses substituted.

SUMMARY JUDGMENT MOTION

Summary judgment is proper only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. *See Anderson*, 477 U.S. at 257. Genuine factual disputes are those for which the evidence is such that "a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. Material facts are those which might affect the outcome of the suit under governing law. *See id.* "The court must not weigh the evidence or determine the truth of the matter but only determine whether there is a genuine issue for trial." *Crane v. Conoco, Inc.*, 41 F.3d 547, 549 (9th Cir. 1994) (citing *F.D.I.C. v. O'Melveny & Meyers*, 969 F.2d 744, 747 (9th Cir. 1992), *rev'd on other grounds*, 512 U.S. 79 (1994)).

Plaintiff argues that there exists no genuine issue of fact regarding the liability for and the amount of unpaid moorage fees. Defendants do not dispute liability for moorage fees, but question the amount and nature of these fees. Defendants contend: (1) That the monthly lease amount of $1640 was based on an incorrect measurement of the NORTHLAND, the vessel being 186 feet long – not the 205 feet referenced in the original July 1997 lease; (2) That the rate agreed to in the July 1997 lease was a "temporary" rate, and the subsequent monthly rate should have been lower; (3) That the subsequent December 1998 "Memorandum of Agreement" was invalid, as it was signed by a temporary bookkeeper, who had no authority to bind NFI; and (4) That the late fees charged by plaintiff are not referenced in the original lease and were not agreed to by NFI, and that the interest on the balance owed was improperly calculated.

Defendants' contentions will be addressed in order. For reasons discussed *infra*, the court finds that those contentions are insufficient to defeat summary judgment.

Mutual Mistake of Fact

Defendants' first contention is that the monthly lease amount was based on a mutual mistake of fact regarding the NORTHLAND's length. Defendants contend that the NORTHLAND is 186 feet, while the monthly lease amount was based on a length of 205 feet.

Mutual mistake as to an essential element of a lease is a permissible defense. *See Public Util. Dist. No. 1 v. WPPSS*, 705 P.2d 1195, 1203 (Wash. 1985). Defendants bear the burden of proof regarding that defense. *See Keierleber v. Botting*, 466 P.2d 141, 144 (Wash. 1970). It is unclear whether defendants have raised the defense to avoid the lease and relegate plaintiff to quantum meruit recovery, or to obtain the equitable remedy of reformation. Avoidance is appropriate if the parties were mutually mistaken regarding a basic assumption necessary for a meeting of the minds to have occurred. The party who seeks avoidance must also be found to not have borne the risk of mistake through conscious disregard. *See Public Util. Dist. No. 1*, 705 P.2d at 1204; & RESTATEMENT (SECOND) OF CONTRACTS § 152 (1979). Reformation is appropriate if the parties had reached a meeting of the minds regarding essential elements, but the agreement was incorrectly expressed in writing. *See Williams v. Fulton*, 632 P.2d 920 (Wash. App. 1981); & RESTATEMENT (SECOND) OF CONTRACTS § 155 (1979). The party seeking reformation must provide clear, cogent and convincing evidence of mistake, and must not have borne the risk of mistake through a failure to negotiate in good faith. *See Rolph v. McGowan*, 579 P.2d 1011, 1014 (Wash. App. 1978); & RESTATEMENT (SECOND) OF CONTRACTS, § 157 (1979).

Defendants have not presented sufficient evidence to create a triable issue regarding their defense of mutual mistake to support a remedy of avoidance or reformation. For the reasons that follow, defendants' evidence does not support a reasonable inference that at the time of

assent the parties were mutually mistaken regarding the basis for the monthly moorage amount, or that they acted without fault.

In support of its summary judgment motion, plaintiff presented evidence in a declaration from Jonathan Ives that it based its monthly moorage rate for the NORTHLAND on the vessel's actual overall length. To determine the NORTHLAND's actual overall length, Mr. Ives avers that he relied on the book the FISHING VESSELS OF THE UNITED STATES. That book lists the NORTHLAND's documented length as 186.1 feet and its actual length as 205 feet. Mr. Ives also avers that NFI's authorized agent who negotiated and signed the lease, Bill McVay, confirmed the NORTHLAND's actual overall length. In response, defendants presented a Coast Guard certificate that states a documented length of 186.1, and an affidavit by Mark Maring that "[i]n [his] experience, moorage is calculated on the documented length of the vessel." (Doc. 26 at 2.)

Defendants' opposition fails to present a genuine factual dispute that the parties' were mutually mistaken regarding the factual basis for the calculation of the monthly moorage amount. Plaintiff has presented the only evidence regarding the parties' expectations at the time of lease formation. The court notes that defendants did not submit an affidavit from Mr. McVay who negotiated and signed the lease for NFI. The undisputed evidence related to the crucial period of lease formation indicates that the parties based the monthly moorage amount on the NORTHLAND's actual overall length of 205 feet, as reflected in a reference book. If there was any mistake as to the proper factual basis for calculating moorage, it was unilateral, held only by Mr. Maring.

Furthermore, assuming that there is a genuine factual dispute regarding the actual length of the NORTHLAND and a mutual mistake regarding that fact occurred during lease formation, NFI is not entitled to reformation or avoidance due to their fault. NFI should bear the risk of mistake due to its ignorance of the actual length of its own vessel at the time of negotiation.

NFI and plaintiff were on equal footing during lease negotiation. The court must assume that all material terms expressed in the lease were negotiated in good faith. If NFI believed that the reference book contained an inaccuracy regarding the NORTHLAND's actual length, it possessed the information – or could have easily obtained the necessary information – to press its case for lower moorage. The court also notes that NFI performed under the terms of the lease without objection for a number of years.

Accordingly, defendants have failed to present a triable issue regarding their defense of mutual mistake.

Temporary Moorage Rate

The defendants' second contention is that the rate agreed to in the lease was temporary, and long-term moorage rates are customarily lower than temporary rates. (*See* Doc 26.) Defendants rely on a statement by Mark Maring, an officer of NFI, that in his experience, "moorage is calculated on the documented length of the vessel," and that "[t]he per foot charge for short-term moorage is greater than the charge for long term moorage." (*See id.*)

While the lease does have a handwritten notation that says "30 Day Temp," defendants' claim that the long-term moorage rate should be lower is belied by several key facts. First, the lease specifically indicates that it will continue on a month-to-month basis unless one party should choose to terminate. Defendants have presented no evidence that would indicate that the lease was ever terminated, and that any provisions other than those in the lease should govern this dispute. Second, at no time during the period of moorage does it appear that defendants contested the moorage rate of $8.00/foot.

Accordingly, defendants' second contention does not raise a triable issue.

Lease and Memorandum of Agreement Voidable

Defendant's third contention is that the lease cannot be enforced because it was not signed by the plaintiff. Furthermore, defendants argue that the subsequent "Memorandum of

Agreement" is void because it was only signed by a "temporary bookkeeper," who had no authority to sign such an agreement. (*See* Doc. 26 at 3.)

Defendants initially argue that the underlying lease is voidable because it was not signed by a representative from plaintiff. (*See id.*) It is true that the only signature appearing on the document is that of an NFI representative. However, this is sufficient to make the lease legally binding as to the defendant. First, a lease need only be signed by the party against whom enforcement is sought. *See* R.C.W. § 19.36.010; *& J. A. Jones Const. Co. v. Plumbers and Pipefitters Local 598*, 568 F.2d 1292, 1295 (9th Cir. 1978). Second, the lease in this case was a month-to-month agreement, and as such does not fall within the statute of frauds. *See* R.C.W. § 19.36.010. The fact that the lease was not signed by the plaintiff to this action is therefore immaterial.

As to defendants' second argument, the Memorandum of Agreement, if valid, certainly serves as proof that NFI owed plaintiff a substantial amount of money in past due moorage fees, and that the monthly moorage rate was indeed $1640. (*See* Doc. 17 at Ex. B.) Plaintiff's claim, however, is based on the underlying terms of the lease. Even if the Memorandum of Agreement lacks legal effect, defendants have presented no evidence to indicate that the underlying lease is invalid. As a result, the court finds it irrelevant whether the subsequent memorandum is a legally binding document.

Accordingly, defendant's third contention does not raise a triable issue.

Late Fees and Interest Payments

Defendants' fourth contention is that the late fees charged by the plaintiff were not a part of either the original lease or the "Memorandum of Agreement," and cannot be subsequently charged. (*See* Doc. 25.) Furthermore, defendants argue that the interest payments charged by plaintiff are nonsensical, and demonstrate a dispute of fact that should preclude summary judgment. (*See id.*)

The late fees were not part of the original lease, but were later imposed by the plaintiff. (*See* Doc. 29 at Ex. B.) Plaintiff has provided evidence that all tenants of Ballard Mill Marina were notified of this change, effective April 1, 2001. (*See* id.) NFI accepted that additional term of the lease by continuing to perform. There is every indication that NFI was not only aware of the late fees, but willingly paid them. (*See* Doc. 17 at Ex. C.) Defendants have presented no evidence that these late fees were ever disputed. Defendants are therefore responsible for late fees from April 1, 2001.

Furthermore, the interest payments, while admittedly presented in a confusing manner, are consistent with the 15 percent lease provision. (*See id.*) The interest calculations are based on differing periods of time, but the court finds all the calculations to be accurate.

Accordingly, defendants' fourth contention does not raise a triable issue.

RULE 11 SANCTIONS

Plaintiff also requests that the court impose sanctions on the defendants under Federal Rule of Civil Procedure 11. In general, Rule 11 provides for sanctions when a filing is frivolous, legally unreasonable, or without factual foundation, or is brought for an improper purpose. *See Simpson v. Lear Astronics Corp.*, 77 F.3d 1170 (9th Cir. 1996). Defendants' opposition was not clearly frivolous, and cannot be said to have been brought for an improper purpose. Rule 11 sanctions are therefore unwarranted, and plaintiff's request will be denied.

IV

In light of the foregoing, the court ORDERS as follows:

(1) Defendants' request to withdraw Rule 36 admissions is GRANTED;

(2) Plaintiff's request for Rule 11 sanctions is DENIED;

(3) Plaintiff's motion for summary judgment is GRANTED;

(4) There is no just reason for delay of judgment as to the claim of plaintiff. The Clerk shall enter judgment for plaintiff and against defendants in the amount of $53,755.65, plus interest from the March 27, 2002, to the date of judgment at the rate of $16.87 per day. *See* Fed. R. Civ. P. 54(b);

(5) This action shall remain pending for 30 days to permit Taku Marine to file a proper motion for intervention and proposed order in accordance with Local Admiralty Rule 131(a). If Taku Marine files a timely motion and that motion is granted, this action will proceed as to Taku Marine's claim against defendants; and

(6) The Clerk shall send a copy of this Order and the Judgment to all counsel of record.

DATED this 30 day of July, 2002.

John L. Weinberg
United States Magistrate Judge